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QUESTIONS PRESENTED

1. Whether the Re-examination Clause of the Seventh Amendment prohibits federal appellate courts from reviewing jury verdicts for excessiveness.

2. Whether federal courts in diversity cases must apply state-law limits on the size of civil damage awards when reviewing jury verdicts for excessiveness.

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BRIEF FOR RESPONDENT

STATEMENT OF CASE

A. Statement of Facts

Respondent, The Center for Humanities, Inc., is a Mount Kisco, New York, family-owned company which produces educational videotapes and other materials. In 1990, respondent and petitioner, William Gasperini, entered into an agreement whereby respondent was to make an educational videotape entitled *Conflict in Central America* using petitioner's original slide transparencies. Pet. App. 3a; *see also* Joint Appendix ("J.A.") at 359-61. Petitioner thereafter delivered to respondent 300 slide transparencies from his collection of more than 5,000 photographs of Central America. J.A. 161. Upon completion of the videotape, respondent discovered that it had lost petitioner's transparencies. Pet. App. 3a.[1]

B. The District Court Proceedings

On October 19, 1993, petitioner filed an action seeking damages for his lost transparencies in the United States District Court for the Southern District of New York, predicating jurisdiction on diversity of citizenship, 28 U.S.C. § 1332. Respondent admitted liability, J.A. 61, and the trial was limited to the issue of compensatory damages.

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[1] Petitioner claimed that his mother provided an additional ten transparencies, but his mother contradicted that testimony, J.A. 136, and the jury awarded no damages relating to such transparencies.

1. *The Evidence at Trial*

Prior to trial, the district court denied respondent's motion in limine to exclude evidence concerning the purported existence of an "industry standard" of $1,500 per slide for valuing lost transparencies. *See* J.A. 328; *id.* at 19-20. In so ruling, however, the district court declared that it would be "absurd" and "outrage[ou]s" to value each of the 300 lost slides at $1,500. *Id.* at 19. "[N]o witness is going to testify that every transparency that is sold gets that price. Some obviously get more, some get less." *Id.* at 22.[2]

Petitioner focused his trial strategy on convincing the jury to calculate damages based on a $1,500 per slide industry standard.[3] His evidence consisted "largely" of testimony from his expert witness Jane Kinne. Pet. App. 3a-4a. Ms. Kinne testified that there is an industry standard of $1,500 per slide for photographs taken by "a professional photojournalist, once he has been edited," and then valued each of the lost slides at $1,500 because she had "become convinced that [Gasperini] was a professional photographer taking professional quality slides that had been professionally edited." J.A. at 227-28; Pet. App. 6a.

At the conclusion of Ms. Kinne's testimony, the district judge (out of the jury's presence) stated that "it's *incredible*

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2 The New York appellate courts have rejected the existence of any such industry standard. *E.g., Nierenberg v. Wursteria, Inc.*, 189 A.D.2d 571, 572, 592 N.Y.S.2d 27, 28 (1st Dep't 1993) (" . . . no such standard exists"); Pet. App. 4a-5a.

3 *See, e.g.*, J.A. 37 (petitioner's counsel's opening statement) ("At the end of this case, it will be clear to you that an industry standard exists, that the defendant corporation knew about the industry standard, and that at the very minimum Mr. Gasperini is entitled to the industry standard for the 310 photographs."); *see also id.* at 34, 299.

to me that every single one of 310 photographs is worth $1500. . . . *Nobody with any brains can believe that every single one of those [slide transparencies] is worth $1500.*" J.A. 243-44 (emphasis added).

Petitioner offered evidence that a few of his photographs depicted combat situations that he alone captured on film. Pet. App. 5a. But he did not attempt to prove that the vast majority of the photographs were unique; the photographs reflected such things as landscapes, street scenes, pastoral settings, people involved in ordinary daily tasks, or public events that were covered by other photographers.[4]

The record is also clear that petitioner had little, if any, potential of ever marketing the lost slides. Although his brief recites a long list of his employers, there is no

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4 *See, e.g.*, Pet. App. 5a; J.A. 197 (petitioner's testimony that "[u]sually there were" other photographers present when he was taking pictures, including times "when there were hundreds of journalists present"); J.A. 427, 434 (petitioner's trial exhibit describing, *inter alia*, the lost slides of "landscape shots including volcanoes; farming pastoral scenes, such as picking cotton, coffee; . . . industrial factories and workers; people engaged in daily tasks such as plowing, cooking, fishing"); J.A. 168 (petitioner's testimony that many of the lost slides consisted of "a lot of what I would call human interest pictures, pictures of people going about their business, farming, in their homes, street scenes. There were landscape shots.").

Petitioner asserts that his photographs of "major historical figures," such as former Nicaraguan President Daniel Ortega, "depicted images and scenes impossible to recreate," Pet. Br. at 2 & n.2, but petitioner testified that there were always other journalists and photographers present when he took photographs of such political figures. J.A. 197-98. Moreover, although he testified that four of his photographs had been displayed at an exhibition in 1984, J.A. 200, there is nothing in the record to support petitioner's assertion (Pet. Br. at 3) that some of the lost photographs were included in that display.

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evidence that any of these news organizations ever used any of his photographs. Indeed, petitioner conceded that his income from marketing his photographs had never been "substantial," ranging from a "few hundred dollars in a given year to a few thousand." J.A. 150-51. During the ten years preceding trial, petitioner's photographs generated income of approximately $10,000, Pet. Br. at 3, and 40% of those earnings came from payments by respondent in this case. *See* J.A. 195.[5] Although he testified that he hoped someday to write a book and illustrate it with his photographs, petitioner had neither sought nor obtained a publisher at the time of trial and offered no proof that such a book was marketable.[6]

At the close of the evidence, the district judge, out of the jury's presence, stated that "the evidence in this case is *very clear* that there is *no [$1,500] industry standard*." J.A. 280 (emphasis added). In "hindsight," the court concluded, it "probably would have been better off to have excluded" such evidence. *Id.* at 279.

2. *The Jury Instructions and Verdict*

The district court instructed the jury, *inter alia*, that "[t]he purpose of damages is to award . . . just and fair compensation for the loss," J.A. 304, and explained that the "basic measure of damages in this case" is "the fair

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5 Pursuant to their agreement, respondent paid petitioner 15% royalties from the cash receipts from sales of the videotape that used petitioner's photographs; these royalties totaled $551.68. J.A. 195. Respondent also made a payment of $3,500 to petitioner due to the poor sales of the videotape. *Id.* at 128.

6 Petitioner asserts that his "plans concerning his book were confirmed by respondent's expert." Pet. Br. at 3. In fact, the only thing respondent's expert "confirmed" was that he had been informed by respondent's counsel that petitioner claimed he intended to write a book. J.A. 272.

market value of the property lost at the time and place of the loss." *Id.* at 305.[7] The court's instructions also elaborated on the uniqueness and potential earning level factors (*see* Pet. App. 5a) that must be considered under New York law in calculating damages for lost photographs. J.A. 305; Pet. Br. at 7.

After deliberating for less than one hour, the jury announced its verdict: "We award the plaintiff [$]450,000, which is [$]1,500 each, for 300 slides." J.A. 313. Before adjourning, the district court announced, "I'm sure that it's a case which will merit the attention of the Court of Appeals for the Second Circuit." *Id.* at 314.

3. *Denial of Respondent's Post-Trial Motions*

The district court denied, without opinion, respondent's motion for a new trial or remittitur. Pet. App. 11a-12a. Despite that court's prior statements that it would be "absurd," "outrageous" and "incredible" to value each of the 300 slides at $1,500, and that "nobody with any brains" would ever do so—and even though the jury's $450,000 verdict was explicitly premised on precisely that calculation —the court refused to disturb the verdict.

C. The Court of Appeals' Decision

The Second Circuit reversed and remanded the case for a new trial unless petitioner agreed to accept a remitted award of $100,000. Observing that New York law requires consideration of the "uniqueness of the transparencies" in assessing their value, the court held that "*no reasonable jury* could have concluded . . . that each of the lost three

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7 As the district court noted, Mr. Gasperini's counsel elicited no testimony from his expert witness, Ms. Kinne, on fair market value. *See* J.A. 243. On the other hand, respondent's expert, Gilbert deMargitay, did provide such testimony. J.A. 258, 273.

hundred transparencies was equally, and significantly, original." Pet. App. 5a (emphasis added). Indeed, the court concluded that "*[g]iving Gasperini every benefit of the doubt*, there may have been as many as fifty . . . slides" that could be characterized as unique, but there was no evidence concerning the uniqueness of the remaining slides, which "depicted either generic scenes or events at which other professional photojournalists were present." *Id.* at 9a (emphasis added).

The court concluded that this lack of proof of uniqueness concerning most of the photographs, coupled with petitioner's "limited earning power as a photographer"—the other principal relevant factor under New York law—made the $450,000 award a "winning lottery ticket," providing Mr. Gasperini with a "financial windfall." *Id.* at 6a. The court pointed out that the "*only evidence*" of Mr. Gasperini's earning potential was that "commercial use of Gasperini's photographs yielded income of slightly more than $10,000" during the prior ten-year period. *Id.* at 5a (emphasis added). Moreover, "Gasperini did not even earn his living with his camera, and there was *no evidence* presented that he would do so in the future." *Id.* at 5a (emphasis added). And, "there was *no evidence* that Gasperini had found, or would have been able to find," a publisher for the book he planned to write on Central America, "much less that the volume would have earned him significant income." *Id.* at 6a (emphasis added).

The court also held that, as a matter of New York law, Ms. Kinne's expert testimony could not substitute for proof of uniqueness and earning potential. Ms. Kinne's categorical valuation of each and every lost transparency at $1,500 "said a lot about the alleged industry standard and *virtually nothing* about either uniqueness or earning level." *Id.* (emphasis added). The court held that "New York law does not countenance such a methodology." *Id.*

"This being a diversity case," the court explained that it was "bound to follow" New York's state-law standard of excessiveness, which provides that an award is excessive if it "'deviates materially from what would be reasonable compensation.'" Pet. App. 8a (quoting N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney Supp. 1995)). The court carefully canvassed New York state appellate decisions "addressing awards of damages for lost transparencies" and discovered a "clear pattern" that demonstrated that the $450,000 verdict "exceeded" the "outer bounds of what a jury may reasonably award" under New York law in this case. Pet. App. 7a, 9a.

"*Drawing all reasonable inferences in favor of Gasperini*," the court held that "any award totalling more than $100,000 would exceed reasonable compensation." *Id.* at 9a (emphasis added). Accordingly, the court set aside the $450,000 judgment as "excessive under New York law," and ordered a new trial "unless Gasperini acquiesces to an award of $100,000." *Id.* at 3a, 10a.

SUMMARY OF ARGUMENT

Granting petitioner the benefit of every doubt and drawing all permissible inferences in his favor, the court of appeals analyzed the jury's verdict. It found "no evidence" to support several essential aspects of petitioner's claim for damages under New York substantive law and concluded that any award exceeding $100,000 would materially deviate from reasonable compensation and thereby violate New York's limit on excessive damages. Exercising supervisory authority that has existed in common-law courts for centuries, it therefore granted a new trial unless petitioner accepted $100,000 to satisfy his claim.

The Seventh Amendment preserves the "basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details." *Galloway v.*

United States, 319 U.S. 372, 392 (1943). "[T]he rules of the common law" prevailing in 1791 were not "crystalized in a fixed and immutable system"; they were "constantly changing" and varied widely "on procedural matters among the states, and between them and England." *Id.* at 391-92. In particular, the rules regarding "sufficiency [of the evidence] to support a verdict had [not] reached any precise, much less final, form." *Id.* at 392. And this Court has not attempted to incorporate specific common-law forms into the jury trial requirement because the details of such procedures have, in any event, been obscured by the passage of time. *Id.*

The Seventh Amendment's Re-examination Clause does not prohibit federal appellate courts from reviewing excessive jury verdicts. The practice of granting a new trial or remittitur preserves the fundamental right to a jury trial, but ensures that an errant or excessive verdict does not deprive either party of its right to fair procedure. Moreover, as petitioner concedes, and as this Court held over a century ago, federal district courts are constitutionally authorized to grant new trials or remittiturs to redress excessive jury verdicts. The courts of appeals have no less authority under the Re-examination Clause. *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 322 (1967). The purpose of appellate review is to ensure that the district court has properly performed *its* function of applying governing legal limits to the facts of the particular case. This traditional mode of appellate review, which involves a mixed question of law and fact, is perfectly consistent with the Re-examination Clause.

The "rules of the common law" authorized appellate excessiveness review. English common-law courts exercised supervisory authority over jury verdicts. Indeed, Blackstone regarded that supervision as essential to the preservation of the jury system; that "glory of the English

law" would not survive if courts were unable to correct prejudicial, inconsistent or unjust results. 3 William Blackstone, *Commentaries on the Laws of England* 391 (1768). The courts at Westminster, acting "interchangeably" (*id.* at 356) as trial judges and courts of appeal, granted new trials for a variety of reasons, including excessive verdicts. *Id.* at 387. When the first Congress enacted the Judiciary Act of 1789, it followed this practice and granted the power to grant new trials to "all" the courts of the United States. Judiciary Act of 1789, §§ 17-18, 1 Stat. 83.

The common law provided for judicial review closely analogous to federal appellate excessiveness review as it now exists in every circuit. *En banc* panels of judges at Westminster, all or most of whom had not presided over the *nisi prius* trial, decided motions for new trial based on claims of excessive damages. The function of this "court above" (Blackstone, *supra*, at 387) bears a striking resemblance to the function of the federal courts of appeals. Petitioner's contrary argument makes no historical sense. Petitioner argues that the Seventh Amendment grants excessiveness review exclusively to trial judges, authority that did *not* exist at common law, while withholding such authority from *en banc* judges examining the record, precisely the authority that *did* exist at common law.

Petitioner's argument that trial court approval was a *sine qua non* at common law for a new trial on excessiveness grounds reflects a misreading of the authorities. Any requirement of trial court approval, even assuming there was such a consistent practice, applied to new trials granted because the liability determination was against the weight of the evidence, not where the verdict was excessive.

Petitioner errs as well in his assertion that the rules of the common law prevented review of new trial rulings via writ of error. The "rule of the common law" was that the writ

of error was limited to matters in the record. The record at common law did not include a description of the evidence or rulings on new trial motions. It does now. As this Court has explained, "denial of review can no longer rest upon this [historical] ground, since the record before the appellate court has been enlarged to include a motion for new trial." *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 464, 483 (1933).

Interpreting the Seventh Amendment to bar appellate excessiveness review would bring the Amendment into needless conflict with other constitutional provisions. Indeed, such a ruling, which would abolish a practice deeply engrained in the common law and federal judicial systems, would lead to significant disparities between litigation in state and federal courts, because all 50 states provide for appellate review of excessive verdicts. Where state law provides the predicate for a claim, the availability of appellate excessiveness review would depend entirely on whether the verdict was rendered in a state or federal court. The existence of such a dual enforcement scheme for state-created rights would, in turn, produce drastic unevenness in results and, inevitably, rampant forum shopping, contrary to the constitutional principles embodied in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Abolishing appellate excessiveness review also would raise serious due process problems under *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994), which emphasized that judicial review is a vital procedural check on arbitrary and extreme verdicts.

Erie also requires that federal courts apply state-law limits on the size of damage awards in diversity cases. Excessiveness standards, such as New York's "reasonable compensation" limit, are fundamental, substantive policy judgments concerning permissible recovery for violations of state law. As this Court confirmed in *Browning-Ferris Indus. of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989), a district court must apply these legal standards when determining whether to grant a new trial based on excessive damages, and a court of appeals must then evaluate the district court's application of state law for an abuse of discretion. This approach, followed by the Second Circuit below, not only respects state law, but also strikes the proper balance between the roles of the jury, the trial court and the appellate court under federal law.

ARGUMENT

I

THE SEVENTH AMENDMENT'S RE-EXAMINATION CLAUSE DOES NOT PROHIBIT FEDERAL APPELLATE COURTS FROM REVIEWING JURY VERDICTS FOR EXCESSIVENESS

A. The Seventh Amendment Preserves The Common-Law Jury Trial Right, Including The Power Of Courts To Supervise Jury Verdicts

The Seventh Amendment provides that, "In suits at common law, . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. The Amendment responded to fears that the new Constitution would be construed to abolish civil juries entirely. It was designed to secure the general right to a jury trial and to remove the threat that judges would routinely supplant jury verdicts with their own findings of fact. But nothing in the text or history of the Seventh Amendment suggests that the Amendment was intended to enact a detailed code of federal civil procedure, or to limit appellate courts from exercising their full supervisory powers over district courts and juries. *See, e.g., Galloway*, 319 U.S. at 392. ("[T]he Amendment was designed to

preserve the basic institution of jury trial in only its most fundamental elements").

Petitioner argues that the Re-examination Clause of the Seventh Amendment was specifically intended to foreclose "the exercise of appellate review over issues of fact decided by a jury . . . ." Pet. Br. at 22. But there is no evidence to support that interpretation and both the text of the Re-examination Clause and its history refute it.

The Seventh Amendment's text does not remotely convey the meaning petitioner advocates. The Amendment does not distinguish among the "Court[s] of the United States," and does not, in fact, foreclose any review of facts decided by a jury. And it expressly authorizes "*any* Court of the United States" to review a jury's decision if it does so consistently with the rules of common law.

Moreover, the Framers did not intend to prescribe specifically when and how jury trials would be available, or the particular mechanisms for review of jury verdicts. Contrary to petitioner's assertions, there was no great clash between the Federalists and the Anti-Federalists as to the desirability of jury trials. For example, Hamilton, in Federalist No. 83, stated that "[t]he friends and adversaries of the [proposed constitution], if they agree in nothing else, concur at least in the value they set upon the trial by jury." The Federalist No. 83, at 562 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Disagreement was limited to two issues only: whether it was necessary to include an express guarantee of the jury trial right in the Constitution, and if so, how such a guarantee should be crafted.

Hamilton argued that an express textual guarantee was unnecessary and that the Constitution's silence regarding the right to a jury trial in civil actions was by no means an abolition of jury trials. *Id.* at 559-62. The Anti-Federalists countered that Article III specifically guaranteed a jury in

"[t]he Trial of all Crimes," and argued that the silence with respect to civil juries would be construed as a prohibition. This concern was reinforced by the grant to the Supreme Court under Article III of appellate jurisdiction as to "Law and Fact." *See* 3 *The Complete Anti-Federalist* 59-61 (Herbert J. Storing ed., 1981); *Tull v. United States*, 481 U.S. 412, 426 n.9 (1987) ("Although '[w]e have almost no direct evidence concerning the intention of the framers of the seventh amendment itself,' the historical setting in which the Seventh Amendment was adopted highlighted a controversy that was generated . . . by fear that the civil jury itself would be abolished.'") (quoting *Colgrove v. Battin*, 413 U.S. 149, 152 (1973)).

Petitioner argues that the Anti-Federalists can be said to have "won" the argument over whether the Constitution needed an explicit jury trial guarantee. Pet. Br. at 25 n.24. In that limited respect, he is correct. But with respect to the second issue, the drafting of the guarantee, both Federalists and Anti-Federalists tacitly agreed on the Seventh Amendment's very general language.

Hamilton had argued that the "great difference between the limits of the jury trial in different states" made the selection of any specific jury trial rule impossible. Federalist No. 83, *supra*, at 565. There was no universally agreed upon general rule that could be incorporated into the Constitution, and the selection of one state's standard in preference to all others was seen as unworkable. *Id.* at 565-67. Hamilton was not alone in this concern. James Iredell, for example, stated that "The States in these particulars differ very much in their practice from each other." *Pamphlets on the Constitution of the United States, Published During Its Discussion by the People, 1787-1788,*

at 361-62 (Paul L. Ford ed., 1968).[8] In fact, this Court has explained that the common-law rules surrounding the jury trial were not in 1791 "crystalized in a fixed and immutable system," were "constantly changing and developing," and had produced "widely divergent common-law rules on procedural matters among the states, and between them and England." *Galloway*, 319 U.S. at 391-92.

The Anti-Federalists acknowledged the strength of Hamilton's argument. The "Federal Farmer," for example, urged that, rather than a clause "of forty or fifty words" trying to set out every instance in which the jury trial right would obtain, the Framers should "establish it generally," and explained that "it is *the jury trial* we want; the little appendages and modifications tacked to it in the different states, are no more than a drop in the ocean . . . it is the substance we would save, not the little articles of form." 2 *The Complete Anti-Federalist*, *supra*, at 326-27.

Ultimately, of course, the Seventh Amendment was drafted by Madison, an arch-Federalist, who, as a co-author of the *Federalist Papers*, was presumably familiar with Hamilton's sentiments. The Amendment, including the Re-examination Clause, is responsive to Hamilton's argument concerning the great differences that existed among the states in according a jury trial, and is cast in general terms. Rather than a specific, self-defining text, the Amendment is tethered to the undefined body of "suits at common law" and "rules of the common law."

Thus, to the extent that the Anti-Federalists argued for a specific prohibition on appellate review of facts, they can

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8 As Hamilton observed, in four states there was an *automatic* right to a new trial, "till there have been two verdicts out of three on one side." Federalist No. 83, *supra*, at 566.

fairly be said to have *lost* the second argument with the Federalists. For example, Anti-Federalist proposals for an express provision by which appellate review would be "confined to matters of law only," or abolishing appeals "except on matter of law," were rejected. 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 546, 550-51 (Jonathan Storing ed., 1888). Certainly nothing in the text of the Amendment as adopted, nor in the very limited consideration given to it in the ratification process, demonstrates that the Framers had determined to preclude appellate review of jury verdicts or to impose any specific procedures concerning such review.[9]

As a consequence, this Court has consistently and repeatedly recognized that the Seventh Amendment guarantees only the substance of the jury trial right, not a particular form of jury trial or review thereof. To be sure, the Seventh Amendment precludes federal district courts and courts of appeals from re-examination of jury fact-finding other "than according to the rules of the common law" in existence in 1791, in both England and the United States. *See, e.g., Continental Illinois Nat'l Bank & Trust Co. v. Chicago, R.I. & P. Ry.*, 294 U.S. 648, 669 (1935) ("That guaranty has always been construed to mean a trial in the mode and according to the settled rules of the common law, including all the *essential elements*

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9 As one commentator has concluded, "Nowhere in the history of the [Seventh Amendment] can any evidence be found that the relation of judge to jury was considered as affected in any but the most general possible way by the seventh amendment, or even that it was considered at all." Edith G. Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 290 (1966); *see also id.* at 318-20 (Seventh Amendment cannot be understood to embrace any particular civil practice given the widely differing state practices existing at the time of the Amendment's adoption).

recognized in this country and in England when the Constitution was adopted.") (emphasis added). But the Seventh Amendment "does not require that old forms of practice and procedure be retained." *Ex Parte Peterson*, 253 U.S. 300, 309 (1920). The Seventh Amendment was designed to "preserve the essentials of the jury trial," not "to perpetuate in changeless form the *minutiae* of trial practice as it existed in the English courts in 1791." *Dimick v. Schiedt*, 293 U.S. 474, 490 (1935) (Stone, J., dissenting, joined by Hughes, C.J., and Brandeis and Cardozo, JJ.) (emphasis added); *see also Galloway*, 319 U.S. at 394 (the existence of conflicting and even contradictory alternatives to challenge a jury's verdict "give[s] room, not for the inference that one or the other is required but rather . . . that neither is essential"); *Walker v. New Mexico & S. Pac. R.R.*, 165 U.S. 593, 596 (1897).

Indeed, this Court in *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931), upheld the federal practice of granting partial new trials as consistent with the Seventh Amendment, even though that practice was unknown at common law. In doing so, the Court declared: "we are not now concerned with the form of the ancient rule. It is the Constitution which we are to interpret; and the Constitution is concerned, not with form, but with substance." *Id.* at 498.

B. The Re-examination Clause Does Not Prohibit Federal Appellate Excessiveness Review

1. Appellate Excessiveness Review Does Not Implicate The Re-examination Clause

An historical analysis of the "rules of the common law" regarding appellate excessiveness review is unnecessary if such review does not, in the first instance, implicate the Seventh Amendment's Re-examination Clause. In fact, traditional appellate supervision over excessive jury verdicts

is not the sort of "re-examination" of "fact tried by a jury" that the Seventh Amendment addresses.

The debate surrounding the Seventh Amendment's ratification reveals that the Re-examination Clause had a narrow and specific purpose: to preclude judges from nullifying the substance of the right to a jury trial. "It is only where the appellate court may reverse on the facts and then proceed to a final determination of the case that trial by jury has been destroyed." William W. Blume, *Review of Facts in Jury Cases—The Seventh Amendment*, 20 J. Am. Jud. Soc. 130, 131 (1936). This concern that judges might render the jury trial right a sham by deciding factual matters themselves is not at all implicated by an appellate decision to grant a new trial. "If [the district judge] has erroneously refused to grant a new trial a reversal means a new trial before another jury." *Id.* at 131.[10]

Moreover, petitioner concedes that federal district courts are empowered "to review [damage] award[s] for excessiveness . . . and to award remittitur where appropriate." Pet. Br. at 10; *id.* at 38. Petitioner's concession that the Re-examination Clause is no

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[10] Petitioner's insistence that appellate excessiveness review will eviscerate the jury trial right is particularly misguided in light of this Court's statements in *Tull v. United States* that "[n]othing in the [Seventh] Amendment's language suggests that the right to a jury trial extends to the remedy phase of a civil trial," and that it had "been presented with no evidence" that the Framers intended that result. 481 U.S. at 426 n.9. In the absence of an express right to a jury trial of the amount of damages, it is hard to see how the language of the Seventh Amendment can be interpreted to render appellate courts powerless "to patrol the outer bounds of what damages a jury may reasonably award, and to offer a choice between remittitur and a new trial when those bounds have been exceeded." Pet. App. 9a.

impediment to such judicial review of an excessive verdict is fatal to his claims in this Court. The Seventh Amendment does not, as a textual matter, distinguish between trial and appellate courts of the United States. "[I]f, as concededly is the case, a trial judge may set aside a verdict for excessiveness, or direct remittitur . . . without infringing the Seventh Amendment, it should follow that an abuse of discretion in failing to take such action can be reviewed on appeal without doing violence to the Amendment." *Dagnello v. Long Island R.R.*, 289 F.2d 798, 804 (2d Cir. 1961).

Nearly 30 years ago this Court flatly rejected the argument that district courts have greater powers to review jury verdicts under the Re-examination Clause than courts of appeals. In holding that federal appellate courts are authorized to grant judgment notwithstanding the verdict after a district court's denial of such relief, the Court held that "[a]s far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment *n.o.v.* than when a trial court does." *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 322 (1967).

This same reasoning defeats petitioner's Re-examination Clause argument in the case at bar. This Court held in *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69 (1889), that "[t]he practice [of remittitur] . . . is sustained by sound reason, and *does not, in any just sense*, impair the constitutional right of trial by jury. It cannot be disputed that the [trial] court is within the limits of its authority when it sets aside the verdict of the jury and grants a new trial, where the damages are palpably or outrageously excessive." *Id.* at 74 (emphasis added). Federal district courts have exercised that authority consistently for nearly 200 years. *See infra* pages 33-39. The courts of appeals have no less authority under the Constitution.

Both the text of the Seventh Amendment and the historical understanding of the similar roles played by federal trial and appellate courts confirm that appellate review for excessiveness is no greater intrusion on "the province of the jury," *Neely*, 386 U.S. at 322, than a district court's exercise of its unquestioned and constitutionally proper power to conduct its own excessiveness review in the first instance. Indeed, the Judiciary Act of 1789, which petitioner agrees has "'always [been] considered . . . a contemporary exposition of the highest order,'" Pet. Br. at 35 (citation omitted), provided "[t]hat *all* the said courts of the United States shall have power to grant new trials . . . for reasons for which new trials have been granted in the courts of law." § 17, 1 Stat. 83 (emphasis added). Not surprisingly, the text of the Seventh Amendment, which governs re-examination of facts "by any Court of the United States," is fully consistent with the Judiciary Act on this crucial point.

If anything, appellate excessiveness review is *less* intrusive of jury fact-finding than excessiveness review by a district court, because appellate review does not involve direct review of the jury's verdict. While appellate excessiveness review necessarily requires an application of the law to the factual record, its purpose is to supervise the district court's performance of *its* function. As the Court explained in *Browning-Ferris*, "[i]t is not our role to review directly the award for excessiveness, or to substitute our judgment for that of the jury. Rather, our only inquiry is whether the Court of Appeals erred in finding that the District Court did not abuse its discretion in refusing to grant petitioners' motion . . . for a new trial or remittitur." 492 U.S. at 278 (footnote omitted).[11]

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11 *See also* Stephen A. Childress, *Judicial Review and Diversity Jurisdiction: Solving an Irrepressible* Erie *Mystery*, 47 SMU L.

Nor does this indirect review involve a re-examination of fact—or, as petitioner and his *amici* repeatedly seek to characterize it, a reweighing of the evidence. *See, e.g.*, Pet. Br. at 11, 44. On the contrary, review to determine whether a damage award sustained by a district court "materially deviates from . . . reasonable compensation," Pet. App. 8a, or is "grossly excessive, inordinate, [or] shocking to the judicial conscience," *Grunenthal v. Long Island R.R.*, 393 U.S. 156, 159 n.4 (1968), requires the application of legal standards to historical fact determinations, and therefore presents a mixed question of fact and law. *See generally Thompson v. Keohane*, 116 S. Ct. 457, 464 (1995) (discussing Court's definition of mixed questions).[12] The Re-examination Clause plainly permits federal courts to engage in this traditional form of appellate review. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 285 n.26 (1964) (The Seventh

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Rev. 271, 325 (1994) ("In *Browning-Ferris*, the Court's consideration of remittitur may look like review of the jury, but technically it is a review of the judge's review of the jury."); Blume, *supra*, at 131 ("In form and theory the appellate court is reviewing only the decision of the judge—not the verdict of the jury.").

[12] *See Browning-Ferris*, 492 U.S. at 280 (in reviewing punitive damage award on motion for new trial, the district court "applied the proper state-law standard" of excessiveness and its decision in that regard was subject to abuse-of-discretion review on appeal); *e.g., Dagnello*, 289 F.2d at 806 ("We must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law.") (citing *Virginia Ry. v. Armentraut*, 166 F.2d 400, 407 (4th Cir. 1948)); *Laaperi v. Sears, Roebuck & Co.*, 787 F.2d 726, 734 (1st Cir. 1986).

Amendment's "ban on re-examination of facts does not preclude us from determining whether governing rules of federal law have been properly applied to the facts.").

In short, appellate excessiveness review does not implicate the Re-examination Clause because it does not substitute a court's decision on the facts for those of a jury, and only requires a new jury trial where the previous jury has granted a recovery excessive under governing law.

2. The Rules Of The Common Law Allowed Appellate Review Of Excessive Verdicts

Even if appellate excessiveness review constituted a "re-examination" of a jury's decision as to a "fact," such review complies with the Re-examination Clause because it is entirely consistent with judicial supervision of the fundamental elements of jury trials at common law.

a. At the time of the ratification of the Seventh Amendment, English common-law courts had full authority to review the size of jury awards. *See Honda Motor Co.*, 114 S. Ct. at 2335-36 ("English cases, while generally deferring to the jury's determination of damages, steadfastly upheld the court's power to order new trials solely on the basis that the damages were too high."); 3 William Blackstone, *supra*, at 387-88; Coleman Phillipson, *Mayne's Treatise on Damages* 576 (9th ed. 1920). The English reports contain numerous cases, dating from at least 1655, in which a reviewing court ordered a new trial on grounds that a jury award was excessive. *E.g., Wood v. Gunston*, Styl. 466, 82 Eng. Rep. 867 (K.B. 1655); *Chambers v. Robinson*, 2 Str. 691, 93 Eng. Rep. 787 (K.B. 1726); *Seale v. Hunter*, Lofft 28, 98 Eng. Rep. 515 (K.B. 1771); *Jones v. Sparrow*, 5 T.R. 257, 101 Eng. Rep. 144 (K.B. 1793). "The exertion of these superintendent powers of the king's courts, in setting aside the verdict of a jury and granting a new trial, on account of misbehavior of the

jurors, is of a date extremely antient." Blackstone, *supra*, at 387-88. Indeed, Blackstone attributed an early precedent to Chief Justice Glynn in *Wood v. Gunston*, where a new trial was granted for excessive damages because the "notorious partiality in the jurors was a principal species of misbehavior." *Id.* at 388.[13]

The authority to order a new trial because of an excessive verdict was exercised generally by *en banc* panels of judges —panels akin to federal appellate courts—most or all of whose members had not been present at trial. Some jury trials at common law, particularly those of important cases, could be had "at the bar" before one of the common-law courts at Westminster Hall. Blackstone, *supra*, at 352; Thomas Wood, *An Institute of the Laws of England* 479 (1722). Following enactment of the Statute of Westminster 2d in 1285, however, by far the greater number of civil cases were tried at *nisi prius*. Blackstone, *supra*, at 353; William R. Riddell, *New Trial at the Common Law*, 26 Yale L.J. 49, 51 (1916). Under the *nisi prius* system, trials were had throughout the country, thereby saving jurors and litigants the trouble and expense of traveling to Westminster. While all civil cases originated in one of the common-law courts at Westminster, most trials were

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13 Throughout much of this millennium, the jurors who decided cases were to rely on their own knowledge of the litigants and controversy. G.R.Y. Radcliffe & Geoffrey Cross, *The English Legal System* 184 (3d ed. 1954). For this reason, jury verdicts could be attacked through writ of attaint, essentially a prosecution for perjury against the jurors. *Id.;* Blackstone, *supra*, at 374-75, 402-04. With the rise of the neutral jury and the taking of evidence in the sixteenth and seventeenth centuries, attaint fell into disuse in favor of the more civilized practice of an order for new trial. Radcliffe & Cross, *supra*, at 184-85; Blackstone, *supra*, at 374-75, 389.

conducted before a *nisi prius* judge near the site of controversy.

Although many of the *nisi prius* judges were members of one of the common-law courts, they operated under an independent commission while at *nisi prius*. 1 W.S. Holdsworth, *A History of English Common Law* 281 (3d ed. 1922); Blume, *supra*, at 131; Riddell, *supra*, at 52 ("The authority of the presiding judge was not derived from his position as a judge, but from his commission."). Other *nisi prius* judges were not members of the bench at all, but other legal officers commissioned into provincial service. Riddell, *supra*, at 50-52. Each *nisi prius* judge heard whatever cases were present at the locale, regardless of the court from which the case might have originated. *Id.*; Radcliffe & Cross, *supra*, at 183-84.

Trial at *nisi prius* ended with the jury's verdict and its entry on the record in the form of a *postea*. Holdsworth, *supra*, at 281-82; Blackstone, *supra*, at 378 ("When the jury have delivered in their verdict, and it is recorded in court, they are then discharged. And so ends the trial by jury."). So too ended the job of the *nisi prius* judge. Riddell, *supra*, at 53 ("But once the trial was over and the *postea* entered, the Nisi Prius judge was *functus officio*, his commission *quoad* that case exhausted, and all thereafter must be done by the court from which the record came."). The case was returned to the court at Westminster from which it originated, and all further proceedings, including review of the verdict for excessiveness via a motion for new trial, were conducted before the court *en banc*. Blackstone, *supra*, at 386-87; Holdsworth, *supra*, at 282; Radcliffe & Cross, *supra*, at 186. Even for cases tried at bar in Westminster, "application for new trial . . . was not made to the court sitting for the trial of the case or cases at Bar, but to the court sitting in term, *en banc*." Riddell, *supra*, at 57.

Motions for new trial were heard by *en banc* panels of judges, generally within the first four days of the next term. Holdsworth, *supra,* at 282; Radcliffe & Cross, *supra,* at 186-87. The *en banc* court might include the *nisi prius* judge, if the judge were a member of the court, but it often consisted entirely of judges who had not tried the case. In every case in which an *en banc* court reviewed a *nisi prius* verdict for excessiveness, all—or all but one—of the members of the court had to rely on the written report of the trial judge for an account of the evidence in the case. Holdsworth, *supra,* at 282.

Blackstone stressed the importance of this procedure in keeping the "administration of justice and conduct of trials . . . consonant and uniform," and avoiding inconsistency and confusion, because the judges' decisions would be "mutually connected and their judgments blended together, as they are interchangeably courts of appeals or advice to each other." Blackstone, *supra,* at 356. He also insisted that "where justice is not done upon one trial, the injured party is intitled to another." *Id.* at 388. The supervisory power to grant a new trial was essential to public confidence in trials by jury as a corrective device for errors made by juries in complicated cases, or resulting from surprise, hurry or "artful impressions . . . made on their minds by learned and experienced advocates." *Id.* at 390. Thus, "[g]ranting a new trial, under proper regulations, cures all these inconveniences, and at the same preserves intire and renders perfect that most excellent method of decision, which is the glory of the English law." *Id.* at 391.

There are obvious and compelling parallels between *en banc* review for excessiveness at common law, and federal practice as established by the first Congress and as practiced today. Excessiveness review was conducted in England by panels of judges, constituting a tribunal

separate from the trial judge, who in most cases were not present at the trial, and who decided the issue based on argument of counsel and review of a record of the trial proceedings. This is the functional equivalent of today's appellate review. As Blackstone explained, "if any defect of justice happened at the trial, by surprise, inadvertence, or misconduct, the party may have relief *in the court above*, by obtaining a new trial." Blackstone, *supra,* at 387 (emphasis added). *See also* John M. Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of The English Civil Juror*, 32 Am. J. Legal Hist. 201, 214 (1988) ("*Nisi prius* trials were considered subordinate proceedings over which the court *en banc* could exercise special supervisory powers"). The "rules of the common law," then, allowed appellate review of a jury's decision concerning damages to the extent of permitting an order by a "court above" requiring a new trial for excessive damages.

b. Petitioner's argument that the Seventh Amendment allows excessiveness review only by the trial judge, Pet. Br. at 22, makes no historical sense. As petitioner concedes, at common law the *nisi prius* judge who had heard the evidence had no authority to order a new trial for excessive damages. Pet. Br. at 30. That decision was left to an *en banc* court in Westminster reviewing a record of the trial.

Petitioner seeks to avoid the obvious incongruity of his argument by characterizing *en banc* review at common law as a trial proceeding, because the *en banc* court ruled on the motion for new trial before entry of final judgment. Pet. Br. at 30. This argument elevates form over function. In our federal system, the judge who presides over a trial enters judgment. There is, however, no talismanic significance to this procedural nicety, which Congress could abolish by statute anytime it wished to do so. At

common law, the trial judge had no responsibility for entering judgment. Rather, it was the *en banc* court that reviewed the record, ruled on new trial motions, and entered judgment. Review of a jury verdict on the basis of the trial record by a panel of judges not present at trial is today a function of appellate judges and in substance is indistinguishable from Westminster's *en banc* review.[14]

Today's federal court system differs from the English common-law courts in much of its structure and procedure. The Seventh Amendment plainly does not require that the federal judiciary recreate the English common-law courts precisely as they existed in 1791; only that courts preserve the essence of common-law jury trials. "Beyond this, the Seventh Amendment does not exact the retention of old forms of procedure." *Gasoline Prods.*, 283 U.S. at 498. "We are afforded but a meager and fragmentary guide if our [appellate] review is to be controlled by the Seventh Amendment, read as though it had incorporated by reference the particular details of English trial practice exhibited by the law books in 1791." *Dimick*, 293 U.S. at

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[14] Petitioner argues that "[i]t makes no more sense to analogize the English common law trial court to today's federal appellate court, than to contend that a federal district court ceases to act as a trial court when it reviews a magistrate's or bankruptcy judge's determinations." Pet. Br. at 30. But a district court does act as a reviewing court, and engages in "appellate" review, when it examines the record of a trial conducted by a magistrate or proceedings before a bankruptcy judge. *See* 28 U.S.C. § 636(c)(4) (1994) (describing an "*appeal* on the record to a judge of the district court" from a trial conducted by a magistrate (emphasis added); 28 U.S.C. § 158(a) (1994) (describing the jurisdiction of district courts "to hear *appeals* . . . from interlocutory orders and decrees, of bankruptcy judges.") (emphasis added).

494 (Stone, J. dissenting).[15] The fundamental point here for Seventh Amendment purposes is that the common-law rules allowed excessiveness review of a jury's damage verdict by judges who had not presided at the trial.

Petitioner and his *amici* also argue that *en banc* review of excessive verdicts at common law is not analogous to federal appellate review because, they contend, an *en banc* court at common law would not grant a new trial without certification from the judge who tried the case that the verdict was against the weight of the evidence. Pet. Br. at 30-34; Brief *Amici Curiae* of Akhil Amar, et al. and Trial Lawyers for Public Justice ("Trial Lawyers' Br.") at 14. However, petitioner and his *amici* have conflated two separate lines of historical evidence to reach this conclusion. Any requirement of certification from the trial judge applied to new trials based on a liability determination that was against the weight of the evidence. *See* cases and other authority cited in Pet. Br. at 31, Trial Lawyers' Br. at 14. There was no such requirement for new trials based on excessive damages.

Petitioner's confusion concerning these two independent bases for new trial may stem from his misinterpretation of Blackstone. In fact, Blackstone recognized the distinction. Blackstone recites numerous grounds upon which an *en*

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[15] Exacting and fulsome replication of English common-law jury trial practice would make for a strange system indeed. For example, jury service at common law was limited to males with freehold estates. Blackstone, *supra*, at 362. When deliberating, the jurors were "to be kept without meat, drink, fire, or candle, unless by permission of the judge, till they are all unanimously agreed." *Id.* at 375. And "if the jurors do not agree in their verdict before the judges are about to leave the town, though they are not to be threatened or imprisoned, the judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart." *Id.* at 376.

banc court could grant a new trial, separating each with a semicolon. Blackstone, *supra*, at 387. Blackstone describes one such basis as follows: "if it appears by the judge's report, certified to the court, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith," *id.*, a new trial may be ordered. Then, following a semicolon, Blackstone lists another, separate basis: "or if they have given exorbitant damages;" (followed by "or if the judge himself has mis-directed the jury;" etc.). *Id.* Petitioner quotes these two separate grounds together, as if the trial judge's certification was a prerequisite to a new trial for exorbitant damages. Pet. Br. at 34; *see also id.* at 33 n.31 (intermingling weight of the evidence and excessive damage cases). But as a proper reading of Blackstone makes clear, such certification was not listed by Blackstone as a requirement in cases of exorbitant damages. *See also* 3 W. Blackstone, *Commentaries on the Laws of England* (with notes by Joseph Chitty) 387 n.3 (1826) (describing a verdict without or contrary to evidence as the eighth possible ground for a new trial, and excessive damages as the tenth, with no reference to the trial judge's opinion as to the latter).[16]

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[16] At least one of petitioner's *amici*, whose brief expresses the same confusion between weight-of-the-evidence and excessive damages review, has analyzed the problem more accurately elsewhere. Professor Miller's treatise *Federal Practice and Procedure* deals in separate sections with appellate "Review of Weight of the Evidence" and "Review of Size of the Verdict." C.A. Wright, A.R. Miller, M.K. Kane, *Federal Practice and Procedure* §§ 2819, 2820 (2d ed. 1995). In the former section, Professor Miller and his co-authors discuss the English common law and the certification requirement, and only in that section do they argue that the Seventh Amendment precludes appellate review. In the section on review for excessive damages, by contrast, the authors assert—correctly—that it would be "astonishing" if this Court were to find that the Seventh Amendment barred appellate review. *Id.* § 2820, p. 212.

The common-law decisions are consistent with Blackstone. There exist numerous reported decisions in which an *en banc* court ordered a new trial because damages were excessive, with no mention of any certification from, or indeed the opinion of, the trial judge.[17] In other cases, members of the *en banc* court relied on the trial judge's *report*, as it was the only description of the evidence at trial, with no apparent reliance on the trial judge's *opinion*.[18] In still others, cited by petitioner, the *en banc* court gave explicit weight to the trial judge's opinion on the matter.[19] These latter cases do not establish, however, that the *en banc* court was the rubber stamp petitioner and his *amici* imply. Indeed, petitioner cites many cases in which the *en banc* court refused to follow the trial judge's recommendation on

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[17] *E.g.*, *Ash v. Ash*, Comb. 357, 90 Eng. Rep. 526 (K.B. 1696); *Clerk v. Udall*, 2 Salk. 649, 91 Eng. Rep. 552 (K.B. 1702); *Chambers v. Robinson*, 2 Str. 691, 93 Eng. Rep. 787 (K.B. 1726); *Seale v. Hunter*, Lofft 28, 98 Eng. Rep. 515 (K.B. 1771); *Goldsmith v. Lord Sefton*, 3 Anst. 808, 145 Eng. Rep. 1046 (Exch. 1796).

[18] *Huckle v. Money*, 2 Wils. 205, 95 Eng. Rep. 768 (K.B. 1763); *Benson v. Frederick*, 3 Burr. 1845, 97 Eng. Rep. 1130 (K.B. 1766); *Gilbert v. Brutenshaw*, Lofft 771, 98 Eng. Rep. 1059 (K.B. 1774); *Ducker v. Wood*, 1 T.R. 277, 99 Eng. Rep. 1092 (K.B. 1786).

[19] *Boulsworth v. Pilkington*, Jones, T. 200, 84 Eng. Rep. 1216 (K.B. 1685); *Redshaw v. Brook*, 2 Wils. 405, 95 Eng. Rep. 887 (K.B. 1769).

excessive damages. Pet. Br. at 34 n.33.[20] Deference to the trial judge, where it existed, is very much akin to the present federal system of appellate review of new trial rulings for abuse of discretion. *See infra* pages 43-47. Review for abuse of discretion by a federal court of appeals, or deference to the trial judge's opinion among the *en banc* courts at common law, are functionally equivalent.

c. The common law contains another analogue to federal appellate review of a trial court's excessiveness determination: the writ of error. Petitioner argues that it is the only analogue. Because the writ of error involved higher court review only of errors of law, and did not include review of new trial rulings, petitioner insists that

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[20] The *en banc* courts also declined to follow the trial judge in many cases in which the losing party moved for a new trial because the verdict was against the weight of the evidence. *See* Pet. Br. at 34 n.33. Petitioner contends that the *en banc* court would not grant a new trial in weight-of-the-evidence cases without a recommendation to that effect from the trial judge. Pet. Br. at 30-34. As noted, this common-law practice is irrelevant to the issue in this case. In any event, this practice, even assuming it was consistently followed, does not preclude federal appellate weight-of-the-evidence review under the Seventh Amendment. That the *en banc* court might require a recommendation from the trial judge before determining that the verdict was against the weight of the evidence is an understandable limitation in a system in which the reviewing court could assess evidence at trial only through the lens of the trial judge's report. This unique procedural mechanism at common law should not bind federal appellate courts that have access to an objective transcript of trial proceedings and copies of all relevant exhibits. The English common law allowed re-examination of jury verdicts to determine if they were against the weight of the evidence. The *en banc* court retained discretion to accept or reject the recommendation of the trial judge on the issue. The Seventh Amendment accordingly does not preclude such re-examination now.

the Seventh Amendment precludes federal appellate review of new trial rulings. Pet. Br. at 26-28.

Aside from the fact that the writ of error was not the only analogue to federal appellate review,[21] petitioner has misstated the "rule of the common law." The writ of error did not include review of new trial rulings in practice, but not because there was a common-law rule against such review. The common-law "rule" was that a writ of error was limited to matters in the record. Holdsworth, *supra*, at 223; Radcliffe & Cross, *supra*, at 210-11. At common law, the record consisted only of the process, the pleadings, the minutes of the clerk, the verdict, the judgment entered thereon, and the bill of exceptions (alleged legal errors noted by the parties at trial). Radcliffe & Cross, *supra*, at 211; Comment, 32 Mich. L. Rev. 387, 388 (1934). The trial judge's report of the proceedings was not part of the record, nor was the motion for new trial or ruling thereon. Radcliffe & Cross, *supra*, at 211-12; Comment, 32 Mich. L. Rev. at 388. Accordingly, it was not possible for a court on writ of error to review a jury verdict for excessiveness. *See* Radcliffe & Cross, *supra*, at 211 ("the confining of the errors alleged to errors on the record meant that appeals were *in effect* confined to matters of law") (emphasis added).

The situation has changed. The "effective" limitation of the writ of error can no longer justify a failure to provide review of a new trial ruling on appeal, this Court has

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[21] "At common law, after trial at *nisi prius*, the cause was heard by the court in banc upon a rule for a new trial or motion in arrest or for judgment *non obstante*. In that simple proceeding and not in the writ of error, an independent proceeding of a formal and technical character, is the true analogy for appellate procedure." Roscoe Pound, *Principles of Practice Reform*, 71 Cent. L.J. 221, 228 (1910).

explained, because the record on appeal now includes a record of the trial proceedings and the ruling on the new trial motion. "It has been suggested that review [of a new trial ruling on the basis of excessive damages] must be denied because of the historical limitation of the writ of error to matters within the record." *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 464, 482 (1933). "But the denial of review can no longer rest upon this ground, since the record before the appellate court has been enlarged to include, in the bill of exceptions, a motion for new trial." *Id.* Thus, an appellate court that rules on a new trial motion on the basis of matters within the record violates no rule of the common law.

d. In the end, it does not matter if the *en banc* panel at common law looked more like a federal appellate court than a trial court, or if the writ of error included excessiveness review. The Seventh Amendment allows re-examination of jury fact-finding "according to the rules of the common law." The common law plainly permitted re-examination of a jury's verdict to determine whether it was excessive. A federal court violates no common-law rule when it engages in such re-examination. The particular title given to the Article III court performing this review, or the procedure through which it is accomplished, is simply irrelevant. *Cf. Neely*, 386 U.S. at 324.

Appellate review of a new trial ruling on excessiveness may result in approval of the original verdict, reduction of the verdict by consent of the plaintiff, or a new trial. In none of those cases has the appellate court usurped the jury's function. "It is only where the appellate court may reverse on the facts and then proceed to a final determination of the case that trial by jury has been destroyed." Blume, *supra*, at 131.

3. Judicial Review Of Excessive Jury Verdicts Is Deeply Engrained In Common Law And The Federal Court System

Two Terms ago, this Court surveyed the history of excessiveness review and concluded that "Common law courts in the United States followed their English predecessors in providing judicial review of the size of damage awards." *Honda Motor Co.*, 114 S. Ct. at 2336-37. "Judicial review of the amount awarded [by a jury]," the Court explained, "was one of the few procedural safeguards which the common law provided against th[e] danger" of "lawless, biased or arbitrary" jury verdicts. *Id.* at 2341. Indeed, it was out of a concern that "juries sometimes awarded damages so high as to require correction" that common-law courts in the United States provided judicial review, including appellate review of the size of damage awards. *See id.* at 2336-37; *see also id.* at 2342 (Scalia, J., concurring) ("the right of review [of jury verdicts for excessiveness] was a procedure traditionally accorded at common law").

At least as early as 1803, federal courts sitting *nisi prius* recognized that judges had the power to review a jury verdict for excessiveness upon a motion for a new trial, and to require parties to remit excessive amounts or face a new trial. *Lenox v. Wilson*, 15 F. Cas. 322, No. 8247 (C.C. D.C.) (the court heard "[a] motion by the defendant on the ground of excessive damages [which was] overruled by THE COURT, on the plaintiffs' releasing the difference which was about 444 dollars."), *rev'd on other grounds*, 5 U.S. 193 (1803).

In *Blunt v. Little*, 3 F. Cas. 760, No. 1578 (C.C.D. Mass. 1822), Justice Story, sitting on circuit as a trial judge, relied upon English common law and affirmed the court's power to grant a new trial based upon excessive damages: "if it should clearly appear that the jury have

committed a gross error, or have acted from improper motives, *or have given damages excessive in relation to the injury*, it is as much the duty of the court to interfere, to prevent a wrong, as in any other case." *Id.* at 761-62 (emphasis added). Justice Story ordered that "the cause should be submitted to another jury, unless the plaintiff is willing to remit $500 of his damages." *Id.* This Court in *Honda* relied on *Blunt* to support its conclusion that "judicial review of the size of damage awards" was available at common law. 114 S. Ct. at 2336-37.

Blunt and the practices it memorializes were by no means aberrational. In the first 100 years after the passage of the Judiciary Act of 1789, federal trial courts frequently entertained motions for new trials claiming excessiveness of verdicts. For example, there at least 73 reported decisions involving verdicts challenged as excessive during the period 1789 to 1890, and of those decisions, nearly a third resulted in a finding of excessiveness and the granting either of a new trial outright or remittitur. *See* Appendix A, *infra*.

The Circuit Courts of Appeals, almost immediately after their creation by the Evarts Act in 1891, continued the established practice of reviewing jury verdicts for excessiveness, conducting such review in the context of appeals from district court denials of new trial motions.[22]

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[22] *Southern Pac. Co. v. Rauh*, 49 F. 696, 707 (9th Cir. 1892) ("there is nothing in the proceedings to justify this court in saying that the jury were governed by passion or prejudice in fixing the damages, or that the damages are excessive."); *Southern Ry. v. Craig*, 113 F. 76, 79 (4th Cir.) (acknowledging power of excessiveness review, while noting that it would be "reluctant" to exercise that power where the trial court had left the jury's verdict intact), *cert. denied*, 187 U.S. 641 (1902); *Kentucky Distilleries & Warehouse Co. v. Lillard*, 160 F. 34, 40 (6th Cir. 1908) ("It is said . . . that the judgment is grossly excessive. . . . If the damages seem large, they are not, so far as we are permitted to judge, out of proportion to the fault."); *Kewanee Oil & Gas Co. v. Mosshamer*, 58 F.2d 711, 715 (10th Cir. 1932) ("We therefore conclude . . . that the amount of the verdict was not excessive").

Like other nineteenth century courts, the Circuit Courts of Appeals sometimes performed excessiveness review under the guise of reviewing jury verdicts for "passion and prejudice."[23]

Before and shortly after the turn of the century, this Court repeatedly endorsed judicial review and remittitur as consistent with the Constitution.[24] In *Dimick v. Schiedt*,

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[23] *See, e.g., New Orleans & C. R.R. v. Schneider*, 60 F. 210, 212 (5th Cir. 1893); *see also Honda*, 114 S.Ct. at 2337 ("because of the difficulty of probing juror reasoning, passion and prejudice review was, in fact, review of the amount of awards.").

[24] *Northern Pac. R.R. v. Herbert*, 116 U.S. 642, 646-47 (1885) ("The exaction, as a condition of refusing a new trial, that the plaintiff should remit a portion of the amount awarded by the verdict was a matter within the discretion of the trial court. . . . The corrected verdict could, therefore, be properly allowed to stand."); *Arkansas Valley Land & Cattle Co.*, 130 U.S. 69, 74 (1889) ("The practice [of remittitur] . . . is sustained by sound reason, and does not, in any just sense, impair the constitutional right of a trial by jury."); *Kennon v. Gilmer*, 131 U.S. 22, 29 (1889) ("under . . . common law, the court, upon hearing of a motion for a new trial, may in the exercise of its judicial discretion . . . order that a new trial be had unless the plaintiff elects to remit a certain part of the verdict"); *Koenigsberger v. Richmond Silver Mining Co.*, 158 U.S. 41, 52 (1894) (on an objection to a remittitur ruling, this Court stated "there was no error therein, of which either party has a right to complain."); *German Alliance Ins. Co. v. Hale*, 219 U.S. 307, 312 (1911) (affirming lower court denial of a new trial on condition of remittitur); *Gila Valley, Globe & N. Ry. v. Hall*, 232 U.S. 94,

293 U.S. 474 (1935), the Court expressly recognized the long tradition of excessiveness review and remittitur:

> The doctrine [of remittitur] has been accepted as the law for more than a hundred years and uniformly applied in the federal courts during that time. And, as it finds some support in the practice of the English courts prior to the adoption of the Constitution, we may assume that in a case involving remittitur. . . the doctrine would not be reconsidered or disturbed at this late day.

Id. at 484-85. As four dissenting Justices in *Dimick* noted, federal appellate courts, including this Court, did "not hesitate[ ] to resort to the remittitur where, by its use, the necessity of a new trial could justly be avoided."[25]

In the face of all of this history, petitioner nonetheless contends that this Court's decisions spanning "at least 150 years" preclude appellate excessiveness review, Pet. Br. at 37, and his *amici* insist that this Court has so "held in at least 20 cases." Trial Lawyers' Br. at 2, 6-11. But many of the cited cases either have nothing to do with appellate

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103-05 (1914) ("the practice [of remittitur does] not in any just sense impair the right of a trial by jury").

[25] *Id.* at 496-97 (Stone, J., dissenting) (citing *Bank of Kentucky v. Ashley*, 27 U.S. (2 Pet.) 327, 329 (1829); *Phillips & Colby Constr. Co. v. Seymour*, 91 U.S. 646, 656 (1875); *Hopkins v. Orr*, 124 U.S. 510, 514 (1888); *Washington & Georgetown R.R. v. Harmon*, 147 U.S. 571, 590 (1893); *Hansen v. Boyd*, 161 U.S. 397 (1896)).

excessiveness review,[26] or are at most ambiguous as to whether excessiveness was even an issue.[27]

Still other decisions cited by petitioner and his *amici* affirmatively *endorse* appellate excessiveness review and remittitur. In *Kennon v. Gilmer*, 131 U.S. 22 (1889), for example, this Court held that the Supreme Court of the Territory of Montana had erred when, after the trial court had denied a motion for new trial, it reduced the jury's verdict and entered a new judgment *without giving the plaintiff an option for a new trial. Id.* at 29-30. This Court reversed and remanded the case to the Supreme Court of Montana with explicit instructions that it "will be at liberty, in disposing of the motion for a new trial according to its view of the evidence, either to deny or to grant a new trial generally, *or to order judgment for a less sum than the amount of the verdict, conditional upon a remittitur* by the plaintiff." *Id.* at 30 (emphasis added). Thus, *Kennon*, after stating that the Seventh Amendment applied with full force to the territorial courts, *id.* at 28, explicitly authorized an appellate remittitur based upon

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[26] *See, e.g., Marine Ins. Co. of Alexandria v. Young*, 9 U.S. (5 Cranch) 187, 190-91 (1809); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 445 (1830); *United States v. Laub*, 37 U.S. (12 Pet.) 1, 5 (1838); *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 91 (1891); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 247-48 (1940); *Tennant v. Peoria & P. U. Ry.*, 321 U.S. 29, 33-35 (1944).

[27] *See, e.g., Railroad Co. v. Fraloff*, 100 U.S. 24, 27 (1879) ("[t]he main contention" was that the plaintiff's own action of taking excess baggage on a passenger train constituted "a fraud . . . which should prevent *any* recovery in this action") (emphasis added); *Barreda v. Silsbee*, 62 U.S. (21 How.) 146, 166 (1858) (interpretation of contract terms; no mention of excessive damages); *Insurance Co. v. Folsom*, 85 U.S. (18 Wall.) 237, 248-49 (1873) (bench trial; no mention of excessive damages).

excessive damages. *See also Hansen* v. *Boyd*, 161 U.S. 397, 410-12 (1896) (ordering conditional remittitur of that part of jury's verdict produced by erroneous jury instruction); *cf. Fairmount Glass*, 287 U.S. at 482 ("Under certain circumstances the appellate court may inquire into the action of the trial court on a motion for a new trial.").[28]

Petitioner's assertion that the Re-examination Clause question was decided in his favor sometime during the previous century is refuted by the fact that this Court has three times granted certiorari on the issue in the past 40 years, and twice previously declined to resolve it. *See Grunenthal*, 393 U.S. at 158; *Neese v. Southern Ry.*, 350 U.S. 77 (1955). As the Court explained only a few years ago, it has "never . . . expressly" held that the Seventh Amendment precludes or permits appellate review of a denial of a motion to set aside a verdict as excessive. *Browning-Ferris*, 492 U.S. at 279 n.25. And in *Affolder v. New York C. & St. L. R.R.*, 339 U.S. 96, 101 (1950), this Court appeared to engage in excessiveness review itself, stating: "We agree with the Court of Appeals that the amount of damages awarded by the District Court's judgment is not monstrous in the circumstances of this case."

Appellate review of jury verdicts for excessiveness is so thoroughly engrained in our judicial heritage that nearly three decades ago this Court could state that "all 11 Courts of Appeals have held that nothing in the Seventh

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[28] While petitioner and his *amici* cite a few late nineteenth and early twentieth century cases suggesting that the Re-examination Clause might prohibit appellate excessiveness review, only two of those cases even cite the Constitution *Lincoln v. Power*, 151 U.S. 436, 437-39 (1894); *Metropolitan R.R. v. Moore*, 121 U.S. 558, 573 (1887), and none of them can be fairly read to conclude that the Seventh Amendment precludes such review.

Amendment precludes appellate review of the trial judge's denial of a motion to set aside an award as excessive." *Grunenthal*, 393 U.S. at 158 n.3 (citing cases).

C. Petitioner's Interpretation Of The Re-examination Clause Would Create Needless Conflict Between The Seventh Amendment And Other Constitutional Provisions

The various provisions of the Constitution must be construed harmoniously whenever reasonably possible. *See, e.g., Prout v. Starr*, 188 U.S. 537, 544 (1903) ("It is one of the important functions of this court to so interpret the various provisions and limitations contained in the organic law of the Union that each and all of them shall be respected and observed."). Petitioner's interpretation of the Seventh Amendment would bring that Amendment into conflict with other constitutional provisions.

In *Erie R.R. Co. v. Tompkins*, 304 U.S. at 78, the Court announced that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any [diversity] case is the law of the State." 304 U.S. at 78. The Court recognized that "no clause in the Constitution purports to confer. . . upon the federal courts" the power to declare "federal general common law" and that the exercise of such power "invaded rights. . . reserved by the Constitution to the several states." *Id.* at 78, 80. Applying *Erie* in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), the Court characterized "a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties" as "for that purpose, in effect, only another court of the State . . . ." *Id.* at 108-09. Therefore, "the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result."

Id. at 109. It is beyond dispute that the *Erie* doctrine is predicated on principles of constitutional federalism.[29]

Construing the Seventh Amendment to prohibit federal appellate courts from reviewing jury verdicts for excessiveness would undermine severely the constitutional principles embodied by *Erie*. Where state-law provides the substantive predicate for a claim, jury verdicts would be subject to appellate review for excessiveness, or wholly free of such review, depending solely on whether they were rendered in state or federal courts. Even verdicts that would be plainly excessive in state court would be allowed to stand in the federal system if the district court were to deny a motion for new trial or remittitur. Thus, contrary to *Erie*, a "dual system of enforcement of state-created rights" would exist. *See Salve Regina College v. Russell*, 499 U.S. 225, 234 (1991) (holding that under *Erie* federal appellate courts must review district court interpretations of state law *de novo*, otherwise they would create "a dual system of enforcement of state-created rights, in which the substantive rule applied to a dispute may depend on the choice of forum").

All 50 states provide some form of appellate excessiveness review. *See Dagnello*, 289 F.2d at 799-800 n.1 (citing cases from all 50 states except Alaska, Maryland and Oregon); *Honda*, 114 S. Ct. at 2338 (citing cases from Alaska and Maryland and holding that Oregon's denial of excessiveness review of punitive damages violated due process). Denying litigants such appellate review in the

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[29] *See Felder v. Casey*, 487 U.S. 131, 151 (1988) ("[F]ederal courts are constitutionally obligated to apply state law to state claims"); *Hanna v. Plumer*, 380 U.S. 460, 471-72 (1965) ("[N]either Congress nor the federal courts can. . . fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution").

federal system would manifestly frustrate the "twin aims of the *Erie* doctrine—'discouragement of forum-shopping and avoidance of inequitable administration of the laws.'" *Salve Regina*, 499 U.S. at 234 (quoting *Hanna*, 380 U.S. at 468). Because plaintiffs "fear appellate reduction of damages," *Honda*, 114 S. Ct. at 2341 n.11, they could file in federal rather than state court solely to evade appellate review if the Seventh Amendment were held to prohibit federal appellate courts from reviewing excessive verdicts.

Interpreting the Seventh Amendment to bar appellate excessiveness review would have serious collateral consequences that would aggravate the *Erie* problem. "When courts fail to exercise responsibility to curb excessive verdicts, the effects are uncertainty and an upward spiral. One excessive verdict, permitted to stand, becomes precedent for another still larger one." *Consorti v. Armstrong World Indus.*, 72 F. 3d 1003, 1010 (2d Cir. 1995), *pet. for cert. pending* (U.S. No. 95-1339). As more and more excessive verdicts are left undisturbed in the federal system, more and more plaintiffs would no doubt pursue their state-law damage claims in a federal forum. *Erie* prohibits such results.

The complete absence of appellate review of jury verdicts for excessiveness that petitioner contemplates would also raise significant due process concerns by eliminating an important procedural check against arbitrary and extreme damage awards. The Court in *Honda* explained that its prior decisions in the punitive damage context "emphasized the importance of the procedural component of the Due Process Clause," stressing "the availability of *both* 'meaningful and adequate review by the trial court, *and* subsequent *appellate review.*" 114 S. Ct. at 2335 (emphasis added) (citation omitted); *see, e.g., Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20-21 (1991) (expressly recognizing that "appellate review" provides "an

additional check on the jury's or trial court's discretion" that ensures due process.); *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2720 (1993) (plurality opinion) (finding that the punitive damage award "was reviewed and upheld by the trial judge . . . *and* . . . affirmed by a unanimous decision at the State Supreme Court of Appeals" entitled the award to a strong presumption of constitutional validity) (emphasis added). And the constitutional requirement of meaningful judicial review of a damage verdict is not limited to punitive damages. As Justice Scalia explained in *TXO*, "[p]rocedural due process . . . requires, I am certain, . . . judicial review of the reasonableness of jury-awarded compensatory damages (including damages for pain and suffering)." 113 S. Ct. at 2727 (Scalia, J., concurring in the judgment).

Petitioner asks the Court to construe the Seventh Amendment to abolish one of the two traditional layers of judicial review that provide a vital procedural check against excessive damages. If the jury in this case had returned a verdict of $1 million, or $100 million, or $1 billion to compensate petitioner for his lost transparencies, and the district court had declined to disturb such verdicts, petitioner contends that the Re-examination Clause would prohibit the Second Circuit from granting a new trial or remittitur. Basic principles of due process foreclose any such construction of the Re-examination Clause.

II

FEDERAL COURTS IN DIVERSITY CASES MUST APPLY STATE-LAW LIMITS ON THE SIZE OF DAMAGE AWARDS WHEN REVIEWING JURY VERDICTS FOR EXCESSIVENESS

A. *Browning-Ferris*, And The Basic *Erie* Principles Upon Which It Rests, Require Application Of State-Law Excessiveness Standards In Diversity Actions

Petitioner's analysis of the proper standard of excessiveness review is predicated upon a misreading of this Court's decision in *Browning-Ferris*. Petitioner's argument is contradicted both by the language of *Browning-Ferris*, and by the very review that the Court conducted in that case.

Under *Erie*, federal courts in diversity cases are obligated to apply state substantive law. In *Browning-Ferris*, the Court was *very* clear that, in a diversity case, state law provides the standard for determining whether a jury's award of damages is excessive. The Court made this point three times in the space of three pages.

First, the Court declared that "the propriety of an award of punitive damages . . . [is a] question[ ] of state law." 492 U.S. at 278. The Court then made reference to Vermont's rule that courts may set aside punitive damage awards that are "grossly and manifestly excessive." *Id.* n.24. This language refers to punitive damages, of course, but the same reasoning applies to compensatory damages, and petitioner—who himself embraces *Browning-Ferris*—does not contend otherwise.

Second, the *Browning-Ferris* Court expressly *rejected* the petitioners' invitation, comparable to the petitioner's request here, that the Court "craft some common-law standard of excessiveness," on the ground that "these are

matters of state, and not federal, common law." *Id.* at 279. The Court explained that federal courts must "determine whether the jury's verdict is within the confines set by state law," *id.*, and that "[a]dopting a rule along the lines petitioners suggest would require us to ignore the distinction between the state-law and federal-law issues. For obvious reasons, we decline that invitation." *Id.* Third, the Court held that the district court in *Browning-Ferris* "applied the proper *state-law standard* in considering whether the verdict returned was excessive." *Id.* at 280 (emphasis added).

The *Browning-Ferris* Court's holding that state-law excessiveness standards govern in diversity actions is consistent with the Court's other decisions interpreting *Erie*,[30] and is required by the distinction between substance and procedure that guides the Court's determinations in this area. Standards governing the amounts that may be recovered in damages for breach of various societal obligations, such as New York's "reasonable compensation" standard, are fundamental policy judgments by the state concerning the nature and extent of compensation available to injured persons or, in the case of punitive damages, how severely to punish a wrongdoer for engaging in misconduct. When New York, through its legislature, determined that damage awards may not "materially deviate from reasonable compensation," it was

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30 *See, e.g., Simler v. Conner*, 372 U.S. 221, 222 (1963) (per curiam) (in Seventh Amendment context, "[i]n diversity cases, of course, the substantive dimension of the claim asserted finds its source in state law," citing *Erie)*; *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 540 n.15 (1958) (characterizing *Stoner v. New York Life Ins. Co.*, 311 U.S. 464 (1940), as holding that "the federal court should follow the state rule defining the evidence sufficient to raise a jury question whether the state-created right was established").

setting the "confines" of recovery under state law. These limits on recoverable damages arising from violations of state-created tort or contract rights unquestionably are "bound up with the definition of the rights and obligations of the parties," *Byrd*, 356 U.S. at 536, and therefore are "matters of state, and not federal, . . . law." *Browning-Ferris*, 492 U.S. at 279.

Despite the clear statements concerning the applicability of state law in *Browning-Ferris*, petitioner focuses on that portion of the Court's opinion that discusses the *procedures* by which the federal courts are to implement state-law excessiveness standards in diversity actions. *See* Pet. Br. at 13, 17. But petitioner has misconstrued this aspect of *Browning-Ferris*. Although the Court stated that "[f]ederal law . . . will control on those issues involving the proper review of the jury award by a federal district court and court of appeals," *id.* at 278-79, this statement referred only to the procedures for granting new trials and conducting appellate review, not the applicable standard of excessiveness.[31] Petitioner argues that this passage precludes application of state-law excessiveness standards in

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31 In support of this statement, the Court cited *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649-50 (1977), and 6A J. Moore, J. Lucas, & G. Grotheer, *Moore's Federal Practice*, ¶ 59.04[1] (2d ed. 1987). Neither authority supports petitioner's interpretation of *Browning-Ferris*. The cited section in *Moore's Federal Practice* addresses whether state or federal procedural rules concerning new trial motions govern in diversity cases. Notably, in that connection, the treatise approvingly describes *Nodak Oil Co. v. Mobil Oil Co.*, 533 F.2d 401 (8th Cir. 1976), as holding that "state law controls as to whether a verdict is excessive, but federal law controls as to whether the verdict requires a new trial." 6A *Moore's Federal Practice*, *supra*, at 59-16 n.7. And, in *Donovan*, the Court simply articulated the federal *procedural* rule that a plaintiff may not appeal from a remittitur that he has accepted. *Donovan*, 429 U.S. at 650.

diversity actions and requires application of federal standards, but the Court—in the very next paragraph—explicitly *refused* to create a federal excessiveness standard precisely because state law governs that issue. *Id.* at 279.

The *Browning-Ferris* Court itself succinctly explained how the judicial review process works: "In reviewing an award of punitive damages, the role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. The court of appeals should then review the district court's determination under an abuse-of-discretion standard." *Id.* at 279. Even though it was "not clear" that the Second Circuit in *Browning-Ferris* had applied the abuse-of-discretion standard, the Court affirmed the punitive damage award because it was "convinced" that the court of appeals had correctly upheld the district court's decision that the award did not violate the "*state-law standard*" of excessiveness. *Id.* at 280 (emphasis added).

Thus, while judicial review of damage awards in diversity cases "involves questions of both state and federal law," *id.* at 278, *Browning-Ferris* draws a distinct line between the two. State law excessiveness standards must be applied by the district court pursuant to *Erie*, and then the district court determines, as a federal procedural matter, what to do if state law has been violated, *i.e.*, "whether a new trial or remittitur should be ordered." *Id.* at 279. The court of appeals then reviews the district court's determination for abuse of discretion. And, in making that determination, the appellate court necessarily must apply the state-law excessiveness standard to evaluate the correctness of the district court's judgment.

This carefully balanced approach gives full weight to state law in diversity actions, and respects the proper provinces of jury, trial court and appellate court. It also serves both of *Erie's* primary goals: achieving substantial uniformity between cases tried in a federal court and cases tried in the courts of the state in which the federal court sits, and minimizing forum shopping.

Accordingly, despite petitioner's claim of support from *Browning-Ferris*, he has ignored the extent to which that decision expressly invoked state-law standards of excessiveness as part of federal appellate review. The legal regime petitioner and his *amici* seek to impose would disregard state law and *Erie*, and would require federal courts to uphold awards that are excessive under state law and that would be struck down in "a State court a block away." *Guaranty Trust*, 326 U.S. at 109. Such a system would soon lead to a substantial displacement of state substantive law, contrary to *Erie*, and plainly foster forum shopping.

B. The Second Circuit Engaged In The Proper Mode Of Review In This Case

The Second Circuit's review of the district court's decision to deny a motion for a new trial in this case was fully consistent with the *Browning-Ferris* blueprint.

Despite its repeated statements that a verdict valuing each of the lost transparencies at $1,500 would be irrational, the district court, without opinion or comment, denied respondent's motion for new trial or remittitur. The district court's failure to explain the disparity between its express sentiments and its inaction made it all the more necessary for the Second Circuit to perform its appellate function,

ensuring that the district court had fulfilled its duty to apply state law.[32]

Consistent with *Browning-Ferris*, the court of appeals evaluated the district court's action through the prism of the applicable state-law standard of excessiveness. Pet. App. 8a ("This being a diversity case, we are bound to follow the standard set forth in the New York statute."). That standard requires a judicial determination whether "an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney Supp. 1995). Enacted as part of a larger package of tort reform measures, this statute reflects the settled judgment of the people of New York on an important question of policy. The reasonable compensation standard "is quite clearly a substantive rule governing the allowable size of jury verdicts." *Consorti*, 72 F.3d at 1012 n.8.[33]

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32 In *Fairmount Glass*, the Court suggested that where, as here, the trial judge expressly criticizes the verdict on the record, yet refuses to grant a new trial, that refusal might be "held erroneous as a matter of law." 287 U.S. at 485 & n.12.

33 Petitioner argues that the Second Circuit went beyond application of state substantive law and held that "state law also provides the appellate standard for reviewing the jury's findings of fact." Pet. Br. at 8. What petitioner characterizes as the state's "appellate standard," however, *is* the state substantive standard: New York's policy decision that damage awards are to be restrained by the concept of "reasonable compensation." And that standard's application is not just limited to appeals—it applies with equal force when New York state trial judges review damage awards for excessiveness. *See, e.g., Inya v. Hyundai, Inc.*, 209 A.D.2d 1015, 619 N.Y.S.2d 440 (4th Dep't 1994); *Wendell v. Supermarket Gen. Corp.*, 189 A.D.2d 1063, 1064, 592 N.Y.S.2d 895, 896 (3d Dep't 1994); *Ramos v. City of New York*, 169 A.D.2d 687, 565 N.Y.S.2d 68, 69 (1st Dep't 1991).

In applying New York's law, the Second Circuit respected the traditional relationships among federal juries, trial courts and appellate courts. The court first applied New York's excessiveness standard ("Applying this standard, we conclude that the jury's award of $450,000 to Gasperini materially deviates from what is reasonable compensation"), and *then* proceeded to review the district court's decision, through the traditional, deferential federal abuse-of-discretion standard (acknowledging the role of the jury and giving "every benefit of the doubt" and "[d]rawing all reasonable inferences" in favor of petitioner). Pet. App. at 8a-9a. The court of appeals plainly did not permit the state statute to "control" (Pet. Br. at 18) the procedural elements of federal appellate review.[34]

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34 Petitioner argues that the Second Circuit adopted the remittitur portion of New York's "state procedures," even though the Second Circuit would be prohibited from adopting New York's additur procedures. Pet. Br. at 17-18 & n.15. Petitioner may be correct that such a pick-and-choose approach to state procedure would "lead[ ] to absurdities," *id.* at 17-18, but that speculation is irrelevant. The Second Circuit did not adopt any New York procedures, either additur or remittitur. The court examined New York's *substantive* law on excessiveness, through the federal mechanism of appellate review, and ordered remittitur as a matter of federal procedure.

To dramatize his "absurdity" argument, petitioner also assumes that a federal court exercising diversity jurisdiction would not be able to apply New York's standard that prohibits "inadequate" verdicts. Pet. Br. at 18. That assumption emphasizes petitioner's confusion between state substantive law and federal procedure. Although this is not an "inadequacy" case, the Second Circuit in such a case would be able to apply the state substantive law, exercise federal review, and then, if it concluded that the district court had abused its discretion in rejecting an "inadequacy" motion, order a new trial. Thus, as in this case, state law provides the substantive standard, but federal law provides the procedure by which that standard is enforced.

While petitioner argues for "extremely deferential" review, Pet. Br. at 41, the Court in *Browning-Ferris* concluded that traditional abuse-of-discretion review provides the "proper deference" in this context. 492 U.S. at 278. Affording any greater appellate deference to district court applications of state law would contradict *Erie*. *Cf. Salve Regina*, 499 U.S. at 234.

The Second Circuit engaged in the proper mode of review here. While it did not expressly use the phrase "abuse of discretion," the court clearly concluded that the district court's judgment was a serious abuse of discretion. The court of appeals carefully studied New York state appellate decisions involving damages for lost slide transparencies and detected a "clear pattern" of awards that informed its application of the reasonable compensation standard to the facts of this case. Even after indulging "all reasonable inferences" and "every benefit of the doubt" in favor of the verdict below, the court of appeals found "no" evidence to support petitioner's claim in certain respects and ultimately decided that the verdict exceeded the "outer bounds of what damages a jury may reasonably award" under New York law. The court likened the $450,000 verdict—which was equivalent to 450 years of petitioner's prior income from his photographs—to a "winning lottery ticket" and "a financial windfall." The Second Circuit left no room for doubt that the district court abused its discretion when it upheld a verdict that "no reasonable jury" could have reached, and that the district court itself had said would be absurd, incredible and outrageous.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

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APPENDIX

APPENDIX A

Bingham v. Cabot, 3 U.S. (3 Dall.) 19, 25 (1795) (motion in lower court proceeding for new trial on grounds of excessive damages denied in case of privateer against public agent to recover proceeds from goods that were captured);

Lenox v. Wilson, 15 F. Cas. 322 (C.C.D.C. 1804) (No. 8247) (motion for new trial on grounds of excessive damages overruled when plaintiffs remitted 444 dollars);

Estill v. Blakemore, 8 F. Cas. 798 (C.C.D. Tenn. 1808) (No. 4538) (motion for new trial on grounds of excessive damages denied in breach of covenant case);

Pope v. Barrett, 19 F. Cas. 1018, 1021 (C.C.D. Mass 1816) (No. 11,273) (motion for new trial on grounds of error in jury charge and excessive damages; motion granted unless plaintiff consented to remit excess);

Gray v. James, 10 F. Cas. 1019, 1020-21 (C.C.D. Pa. 1817) (No. 5719) (motion for new trial on grounds of excessive damages denied in patent infringement case);

Swann v. Bowie, 23 F. Cas. 504, 505-06 (C.C.D.C. 1820) (No. 13,672) (motion for new trial on grounds of excessive damages denied where defendant killed plaintiff's dog);

Blunt v. Little, 3 F. Cas. 760, 761-62 (C.C.D. Mass. 1822) (No. 1578) (motion for new trial on grounds that $2,000 jury award was excessive unless plaintiff agreed to remit $500 of his damages);

Parker v. Lewis, 18 F. Cas. 1145, 1147 (Sup. Ct. Ter. Ark. 1829) (No. 10741A) (motion for new trial on grounds of excessive damages in trespass case granted where court "clearly of the opinion the damages found by the jury [were] outrageously and flagrantly excessive.");

Cushman v. Waddel, 6 F. Cas. 1077, 1078 (C.C.D.N.J. 1830) (No. 3516) (motion for new trial on grounds of excessive damages; parties settled before disposition);

Blydenburg v. Welsh, 3 F. Cas. 771, 776 (C.C.D. Pa. 1831) (No. 1583) (motion for new trial on excessive damages granted);

Thurston v. Martin, 23 F. Cas. 1189, 1190-91 (C.C.D.R.I. 1830) (No. 14,018) (motion for new trial on grounds of excessive damages denied in false imprisonment case);

Whitney v. Emmett, 29 F. Cas. 1074, 1084 (C.C.E.D. Pa. 1831) (No. 17,585) (motion for new trial on grounds of excessive damages denied in patent case);

Wiggin v. Coffin, 29 F. Cas. 1157, 1160-61 (C.C.D. Me. 1836) (No. 17,624) (motion for new trial on grounds of excessive damages granted in malicious prosecution case);

Stanley v. Whipple, 22 F. Cas. 1046, 1048 (C.C.D. Ohio 1839) (No. 13,286) (motion for new trial on grounds of excessive damages in patent case denied after court fulfilled duty to "look into the evidence.");

Alden v. Dewey, 1 F. Cas. 329, 330 (C.C.D. Mass. 1840) (No. 153) (motion for new trial on grounds of excessive damages denied in patent case);

Clark v. Ford, 5 F. Cas. 868 (C.C.D.C. 1841) (No. 2820) (motion for new trial on grounds of excessive damages denied in libel case);

Stokes v. Kendall, 23 F. Cas. 141 (C.C.D.C. 1842) (No. 13,480) (motion for new trial on grounds of excessive damages granted; verdict reinstated after plaintiff amended declaration);

Holmead v. Chesapeake & O. Canal Co., 12 F. Cas. 389 (No. 6626) (C.C.D.C. 1842) (motion for new trial on grounds of excessive damages denied);

Jones v. Van Zandt, 13 F. Cas. 1047, 1054 (C.C.D. Ohio 1843) (No. 7502) (motion for new trial on grounds of excessive damages granted);

Whipple v. Cumberland Manufacturing Co., 29 F. Cas. 934, 938 (C.C.D. Me. 1843) (No. 17,516) (motion for new trial on grounds of excessive damages denied in tort case);

Allen v. Blunt, 1 F. Cas. 450, 460-61 (C.C.D. Mass. 1846) (No. 217) (motion for new trial on ground of excessive damages denied in patent case);

Stephens v. Felt, 22 F. Cas. 1280 (C.C.S.D.N.Y. 1846) (No. 13,368) (motion for new trial in patent case denied

where jury verdict, in court's view, not "a case of palpable extravagance.");

Trigg v. Conway, 24 F. Cas. 194 (C.C.D. Ark. 1847) (No. 14,172) (motion for new trial on grounds of excessive damages and evidentiary error; new trial granted on grounds of evidentiary error);

Stimpson v. Railroads, 23 F. Cas. 103 (C.C. 3d Cir. 1847) (No. 13,456) (motion for new trial on grounds of excessive damages denied in patent case);

Aiken v. Bemis, 1 F. Cas. 229 (C.C.D. Mass. 1847) (No. 109) (motion for new trial on grounds of excessive damages in patent case and new evidence; court found damages not excessive, but granted new trial on grounds of new evidence);

Foote v. Silsby, 9 F. Cas. 373, 382 (C.C.N.D.N.Y. 1849) (No. 4916) (motion for new trial on grounds of excessive damages denied in patent case where "in [court's] judgment the damages were not excessive or unreasonable");

Battin v. Hewes, 58 U.S. (17 How.) 74, 77 (1854) (motion in first trial for new trial on grounds of excessive damages granted in patent case);

Palmer v. Fiske, 18 F. Cas. 1030, 1031 (C.C.D. Me. 1854) (No. 10,691) (motion for new trial on grounds of excessive damages denied in trespass case);

White v. Arleth, 29 F. Cas. 978, 980-81 (C.C.S.D. Ohio 1860) (No. 17,536) (motion for new trial on grounds of excessive damages denied in breach of contract case);

Wightman v. Providence, 29 F. Cas. 1177, 1179 (C.C.D.R.I. 1860) (No. 17,630) (motion for new trial on grounds of excessive damages denied in personal injury case);

Stafford v. Pawtucket Haircloth Co., 22 F. Cas. 1030 (C.C.D.R.I. 1862) (No. 13,275) (motion for new trial on grounds of excessive damages granted in patent case when court found "[l]ooking at the whole case, it is quite clear that the damages are greatly excessive.");

Johnson v. Root, 13 F. Cas. 798 (C.C.D. Mass. 1862) (No. 7409) (motion for new trial on grounds of excessive

damages as well as other grounds in patent case; verdict set aside and new trial ordered);

Warren v. Robertson, 29 F. Cas. 282 (C.C.D. Conn. 1876) (No. 17198A) (motion for new trial on grounds of excessiveness granted in tort case unless plaintiff consented to remit excess);

Sargent v. Inhabitants of Bristol, 21 F. Cas. 498, 501 (C.C.D. Me. 1876) (No. 12,363) (motion for new trial on grounds of excessive damages denied in employment case);

Waters v. Campbell, 29 F. Cas. 412, 415 (C.C.D. Or. 1877) (No. 17,265) (motion for new trial on grounds of excessive damages granted in false imprisonment case unless plaintiff consented to remit excess);

Russell v. Place, 21 F. Cas. 57, 58 (C.C.N.D.N.Y. 1871) (No. 12,161) (motion for new trial on excessive damages granted in patent case unless plaintiff agreed to remit excess);

Gibson v. Cincinnati Enquirer, 10 F. Cas. 311, 312-13 (C.C.S.D. Ohio 1877) (No. 5392) (motion for new trial on grounds of excessive damages denied in libel case);

Whitehouse v. Grand Trunk Ry., 29 F. Cas. 1033, 1038 (C.C.D. Me. 1877) (No. 17,565) (motion for new trial on grounds of excessive damages denied in negligence case);

Quigley v. Cent. Pac. R.R., 20 F. Cas. 138, 141 (C.C.D. Nev. 1878) (No. 11,510) (motion for new trial on grounds of excessive damages granted unless plaintiff remitted excess in case where defendant ejected plaintiff from train);

Harvey v. Grand Trunk Ry., 11 F. Cas. 738, 740 (C.C.D. Me. 1878) (No. 6181) (motion for new trial on grounds of excessive damages denied in breach of contract case after court's "careful examination of the whole case.");

Wood v. Ward, 30 F. Cas. 479, 482 (C.C.S.D. Ohio 1879) (No. 17,966) (motion for new trial on grounds of excessive damages denied);

Brown v. Memphis & C.R.R., 7 F. 51 (C.C.W.D. Tenn. 1881) (motion for new trial on grounds of excessive damages denied where railroad company excluded from the

female car, female whose "reputation [was] so notoriously bad");

Reiss v. North-German Lloyd, 11 F. 844, 846 (C.C.E.D.N.Y. 1881) (motion for new trial on grounds of excessive damages denied in personal injury case);

Keep v. Indianapolis & St. Louis R.R., 10 F. 454 (C.C.E.D. Mo. 1882) (motion for new trial on grounds of excessive damages denied in tort and contract case);

Rose v. Stephens & Condit Transp., 11 F. 438, 440 (C.C.S.D.N.Y. 1882) (motion for new trial on grounds of excessive damages denied in negligence case);

Gallena v. Hot Springs R.R., 13 F. 116, 125 (C.C.E.D. Ark. 1882) (motion for new trial on grounds of excessive damages in case where passenger ejected from train; motion withdrawn when plaintiff agreed to lesser amount);

Tiblier v. Alford, 12 F. 262 (C.C.E.D. La. 1882) (motion for new trial on grounds of excessive damages denied in unlawful seizure case after plaintiff consented to remittitur);

Wabash Ry. v. McDaniels, 107 U.S. 454 (1883) (motion in lower court proceeding for new trial on grounds of excessive damages denied in personal injury case);

Bierbach v. Goodyear Rubber Co., 15 F. 490, 494 (C.C.E.D. Wis. 1883) (motion for new trial on grounds of excessive damages granted in personal injuries case unless plaintiff agreed to remit excess);

Brown v. Evans, 17 F. 912, 919 (C.C.D. Nev. 1883) (motion for new trial on grounds of excessive damages denied in assault and battery case);

Malloy v. Bennett, 15 F. 371, 376 (C.C.S.D.N.Y. 1883) (motion for new trial on grounds of excessive damages granted in libel case after "a critical review of the proceedings");

Hardesty v. Pyle, 15 F. 778, 782 (C.C.W.D. Pa. 1883) (motion for new trial on grounds of excessive damages denied after "a careful consideration of the whole case");

Smith v. Memphis & L.R.R., 18 F. 304, 311 (C.C.W.D. Tenn. 1883) (motion for new trial on grounds of excessive

damages denied in case where foot crushed and permanently injured due to defective railroad track);

Frericks v. Bermes, 22 F. 424, 425 (C.C.D.N.J. 1884) (motion for new trial on grounds of excessive damages denied in personal injury case);

Philbrick v. City of Niles, 25 F. 265, 266 (C.C.W.D. Mich. 1885) (motion for new trial on grounds of excessive damages denied in personal injury case);

Clear v. Fox, 26 F. 90, 92 (C.C.E.D. Va. 1885) (motion to set aside verdict granted where judge stated that "even if [the plaintiff] had a right to some compensation, I do not think it should sound in many thousands of dollars.");

Taylor v. Rice, 27 F. 264 (C.C.D. Ind. 1886) (motion for new trial on grounds of excessive damages granted in malicious prosecution case);

Osborne v. City of Detroit, 32 F. 36, 43 (C.C.E.D. Mich. 1886) (motion for new trial on grounds of excessive damages denied in personal injury case);

Nonce v. Richmond & D. R.R., 33 F. 429, 437 (C.C.W.D. N.C. 1887) (motion for new trial on grounds of excessive damages granted in personal injury case);

Collins v. Whitehead, 34 F. 121, 123 (C.C.D. Colo. 1888) (motion for new trial on grounds of excessive damages denied in libel and slander case);

Harris v. Louisville, N.O. & T.R.R., 35 F. 116, 128 (C.C.W.D. Tenn. 1888) (motion for new trial on grounds of excessive damages denied in false imprisonment case);

Parshall v. Minneapolis & St. L. Ry., 35 F. 649, 651 (C.C.D. Minn. 1888) (motion for new trial on grounds of excessive damages denied in personal injury case);

Clarke v. American Dock & Improvement Co., 35 F. 478 (C.C.S.D.N.Y. 1888) (motion for new trial on grounds of excessive damages denied in malicious prosecution and false imprisonment case);

Cuthbert v. Galloway, 35 F. 466, 471 (C.C.S.D.N.Y. 1888) (motion for new trial on grounds of excessive damages denied in false imprisonment case);

Owens v. Baltimore & O.R.R., 35 F. 715 (C.C.S.D. Ohio 1888) (motion for new trial on grounds of excessive damages denied in insurance case);

Fotheringham v. Adams Express Co., 36 F. 252, 254 (C.C.E.D. Mo. 1888) (motion for new trial on grounds that $20,000 verdict constituted excessive award for false imprisonment case granted unless plaintiff agreed to remit $8,000);

Estill v. New York L.E. & W.R.R., 41 F. 849 (C.C.W.D. Mo. 1888) (motion for new trial on grounds of excessive damages for injuries to cattle denied if plaintiff agreed to remit excess damages in related case);

Arkansas Valley Land & Cattle Co. v. Mann, 130 U.S. 69 (1889) (motion in lower court proceeding for new trial on grounds of excessive damages denied in conversion case, unless plaintiff agreed to remit excess).

Shumacher v. St. Louis & S.F.R.R., 39 F. 174, 180 (C.C.W.D. Ark. 1889) (motion for new trial on grounds of excessive damages denied in negligence case);

Lund v. Hershey Lumber Co., 41 F. 202, 203 (C.C.D. Minn. 1890) (motion for new trial on grounds of excessive damages denied in negligence case);

McDonald v. Union Pac. Ry., 42 F. 579, 583-85 (C.C.D. Colo. 1890) (motion for new trial on grounds of excessive damages granted in first trial, then denied after second trial in negligence case);

Ross v. Texas Pac. Ry., 44 F. 44, 48-49 (C.C.W.D. Tex. 1890) (motion for new trial on grounds of excessive damages denied in case where child killed on railroad tracks);

Fell v. Northern Pac. R.R., 44 F. 248, 254 (C.C.D.N.D. 1890) (motion for new trial on grounds of excessive damages denied in case where plaintiff kicked off moving train).